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No. 91-601

In The

Supreme Court of the United States

October Term, 1991

EDWARD J. ROMERO,

Petitioner,

v.

ALBERT AGUAYO, DONALD MOSER, JAMES SCAMMAN, and SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals follow established precedent and correctly hold that the findings of an impartial administrative hearing officer which were binding on the Board of Education broke the chain of causation between alleged retaliatory motivation of an individual defendant who was involved in the initial investigation and the Board's decision to terminate Petitioner?

2. Did the Court of Appeals follow established precedent and correctly hold that Petitioner was unable to demonstrate the Board of Education's decision to terminate him was influenced by anyone or anything except the impartial hearing officer's report?

3. Did the Board of Education follow established precedent and correctly hold that Petitioner was terminated because of his repeated misconduct while employed by the School District?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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STATEMENT OF THE FACTS

Petitioner's Statement of Facts simply ignores and omits the uncontradicted findings of fact that chronicled the teacher's misdeeds and required his termination. More significantly, he omitted the most damning conclusions of the Hearing Officer.

On page 9 of the Petition for Certiorari, Petitioner gave a deliberately incomplete quotation of some conclusions and recommendation of the Hearing Officer. The

paragraph in the Hearing Officer's Findings and Conclusion that led up to the quoted section is the most telling condemnation of the teacher's actions and summarizes the catalogue of gross misconduct by the Petitioner which was the cause of his dismissal from the School District.

> This case involves instances of physical abuse of students, violation of interscholastic wrestling rules, humiliation of students, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes for discipline. It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal.

(A-118)

The Hearing Officer made those findings and reached that conclusion after a full adversary hearing under the Colorado Teacher Employment, Dismissal and Tenure Act, C.R.S. § 22-63-101, *et seq.* (the "Tenure Act").[1]

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[1] Under the Tenure Act provisions in effect at the time relevant to this lawsuit, the process for dismissal of a tenured teacher commences with the filing of charges for dismissal with the board of education "by the chief executive officer of the district or any member of the board." *C.R.S. § 22-63-117(2).* The statutory grounds for dismissal include, *inter alia*, incompetency, neglect of duty, immorality, and other good and just cause. *C.R.S. § 22-63-116.* The board must then decide whether to accept the charges for review. *C.R.S. § 22-63-117(2).* If the board accepts the charges, the teacher is so notified. *C.R.S. § 22-63-117(3).* The teacher may request a hearing on the charges. *C.R.S. § 22-63-117(3).*

(Continued on following page)

It was those very misdeeds which led numerous students and parents to approach Dr. Albert Aguayo, Assistant Superintendent for Secondary Education, in January 1986 with complaints about Petitioner's abuse of students, violation of rules, and other misdeeds, in his role as a teacher and wrestling coach at Manual High School. The parents and students approached the Assistant Superintendent because some of these same parents and students were dissatisfied with the results of a prior contact with the high school administration regarding this same teacher. Donald Moser, Manual High School

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(Continued from previous page)

Hearings are conducted by the Division of Administrative Hearings, an agency of Colorado state government. *C.R.S. § 22-63-117(5).* A neutral hearing officer is selected from a list of three available. The district and the teacher each strike one name; the remaining hearing officer hears the case. *C.R.S. § 22-63-117(5).* The Division of Administrative Hearings Rules incorporate the full range of discovery procedures available under the Colorado Rules of Civil Procedure. *Rule 8, 1 C.C.R. 104-1.*

The hearing officer conducts a full-scale adversarial, on-the-record hearing. *C.R.S. § 22-63-117(7)(8).* The hearing officer makes findings of evidentiary fact, ultimate fact, and a recommendation to the board that the teacher be dismissed or retained. *C.R.S. § 22-63-117(8).* The hearing officer's findings of evidentiary fact are binding on the board. *Blaine v. Moffat County School Dist. RE-1,* 748 P.2d 1280, 1288 (Colo. 1988). The board may make its own findings of ultimate fact (i.e., whether the historical facts establish one of the statutory grounds for dismissal) and may impose a different sanction, but those determinations must be well grounded in the hearing officer's findings of evidentiary fact. *Id.* The board's decision is subject to review in the Colorado Court of Appeals. *C.R.S. § 22-63-117(11).*

Principal, was instructed to initiate an investigation into the complaints. He was assisted by Assistant Principal Dr. Farrell Howell and Mr. Lou Lopez of the School District's security office.

On February 14, 1986, based on statements that were handwritten and signed by students and parents and obtained during the investigation, Defendant Dr. James Scamman, School District Superintendent, referred charges to the Board of Education for the dismissal of the Petitioner pursuant to the applicable provisions of the Tenure Act, C.R.S. § 22-63-117(2). The filing of those charges by the Superintendent initiated the statutory procedures. The charges alleged that Mr. Romero had engaged in conduct establishing the following statutory grounds for dismissal under the Tenure Act: insubordination, neglect of duty, immorality, and other good and just cause for dismissal. C.R.S. § 22-63-116. On February 20, 1986, the District's Board of Education accepted the charges for review.

Pursuant to the terms of the Tenure Act, a hearing was held before Hearing Officer (now, Administrative Law Judge) Marshall A. Snider of the Division of Hearing Officers of the Department of Administration of the State of Colorado. (See, Findings of Fact and Recommendation, hereinafter A37-121). Petitioner appeared through counsel and vigorously contested the District's case. He engaged in substantial pre-hearing discovery, including the deposition of at least seven District witnesses. In addition, the Petitioner presented a thorough defense to the charges against him. At least 26 witnesses testified at the hearing for the District and a dozen more testified for the Petitioner.

Subsequent to the hearing, the Hearing Officer made lengthy findings of fact and recommendations. (A37-121) The district court concluded that the factual findings were not subject to relitigation in the federal court.[2] Significantly, Petitioner disputes none of these factual findings. Hearing Officer Snider found Petitioner engaged in various acts of misconduct amounting to immorality within the meaning of the Tenure Act. (A87). Such conduct included pulling one student's hair to get him to admit to having sex and slamming another student against a locker (Findings, A87); instructing student wrestlers to use a sauna for artificial weight loss and to lie about their ages in open contravention of interscholastic wrestling rules (A88-89); encouraging students to use violence against other students (A89-90); blackmailing students by threatening to turn a student in for a drug offense if he did not wrestle (A90-91); and threatening to hold up another student's graduation if he did not pay for wrestling stickers (A91); threatening one student by telling him he would break his "goddamn back." (A91). He knowingly allowed physical abuse of students by other students in his home. (A55).

The Hearing Officer found Petitioner had engaged in misconduct amounting to insubordination within the meaning of the Tenure Act. (A95) Such insubordination included Petitioner's willful violation of the District's policies against corporal punishment by striking and

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[2] The trial court entered this ruling orally. It was then incorporated into the Amended Stipulated Pre-Trial Order. (App. 4)

pulling the hair of students (A95); violation of interscholastic wrestling rules (A95), and violating orders of the Principal and Assistant Superintendent not to interfere with the investigation of the pending charges. (A93; 98)

The Hearing Officer ruled the following misconduct of Petitioner amounted to neglect of duty within the meaning of the Tenure Act: assaults on students discussed in connection with the immorality charge, *supra* (A101); throwing keys at a student (A102); condoning use of illegal devices for weight loss (A102); embarrassing a 15-year old female student by making statements in front of others about her physical relationship with a boy (A103); blackmailing students as referenced, *supra* (A104); knowingly allowing physical abuse of students by other students in his home in connection with an outside wrestling program (A106); telling wrestlers to "get" a student for quitting the team or to "kick his butt." (A107)

The Hearing Officer concluded the misconduct discussed above, in connection with the other charges, in addition to his "use of threatening language with students, teachers, and staff," (A116) constituted other good and just cause for dismissal within the meaning of the Tenure Act. (A116-117) Specifically, the Hearing Officer concluded that the misconduct had a direct and adverse impact on the Petitioner's ability to serve as a teacher in the District. (Findings, p. 21). The Hearing Officer concluded: "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

Petitioner's claims of improper motives by Dr. Aguayo and retaliation for alleged exercise of free speech on behalf of minorities were raised and evidence was presented on those claims at the hearing.[3] As noted above, the quotation of the Hearing Officer's conclusions on page 9 of the Petition inexcusably and deliberately omits the two conclusions on this matter. The first is: "Still, the cumulative effect of all of the proven conduct cannot be ignored." (A119) On that same page, the Hearing Officer, more significantly, concluded:

> Nevertheless, he (Romero) has had his day in court in this hearing, and the cumulative nature of the offenses warrants dismissal, regardless of what Dr. Aguayo's motives may have been. (A119)

He recommended to the Board of Education that the teacher be dismissed from his employment as a tenure teacher with the District. (A121)

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[3] Defendants also argued an alternative theory for summary judgment which was not ruled on by the Tenth Circuit. Under *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220 (1986), Petitioner's federal claims should have been dismissed since federal courts in § 1983 or § 1985 cases must give the same preclusive effect to issues or claims already determined in a state administrative proceeding that state courts would give them. The Colorado Supreme Court in *Umberfield v. School District No. 11*, 522 P.2d 730, 733 (Colo. 1974) held that the Tenure Act proceedings give a tenure teacher an opportunity to raise all defenses including constitutional defenses, and the same claims were litigated and resolved in the Tenure Act proceedings in this case. Principles of claims and issue preclusion have been applied to administrative proceedings by the Colorado courts. *Industrial Commission v. Moffatt County School District*, 732 P.2d 616, 620 (Colo. 1987).

On June 19, 1986, the Board of Education adopted the Hearing Officer's Findings of Fact and Recommendation and dismissed Petitioner. Although Petitioner had a right under the Tenure Act to appeal his dismissal to the Colorado appellate courts, C.R.S. § 22-63-117(11), he did not.[4] He then filed this case in the United States District Court.

As a part of the pre-trial order in the district court, the parties entered into the following factual stipulations:

> D. On June 19, 1986, Plaintiff was discharged for cause by the Board of Education of the Defendant School District.
>
> E. Plaintiff could only be discharged for statutorily specified cause.
>
> * * *
>
> G. Plaintiff was afforded a hearing as provided by the Teacher Tenure Act, at which he was represented by counsel. Pursuant to C.R.S. § 22-63-117, Hearing Officer Snider made findings that certain of the statutory grounds for dismissal had been proved and recommended Plaintiff's termination.
>
> H. Relying **solely** on Mr. Snider's finding and recommendation, the Board of Education voted to dismiss Plaintiff. *(Emphasis added).*

(App. 5, 6)

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[4] In oral argument before the United States Court of Appeals for the Tenth Circuit, counsel for Petitioner admitted that if he had filed an appeal in the Colorado Court of Appeals, the termination would have been sustained under the standards of Colorado law.

Based in part on these stipulations and Petitioner's answers to interrogatories and deposition testimony, the Defendants filed their motion for summary judgment. In granting summary judgment, the district court held:

> Plaintiff has conceded the fairness of the administrative hearing and the evidentiary support for the factual findings made by the Hearing Officer. . . . What (the findings of the Hearing Officer) did, however, is break the chain of causation between any retaliatory motivation by the individual defendants and their investigative and prosecutive roles and the discharge decision.
>
> There is nothing to suggest that the evidence relied upon by the Hearing Officer in making his findings was fabricated or tainted by the conduct of the individual defendants.
>
> * * *
>
> Additionally, the deposition testimony of four Board members was that each of them made a decision based solely on the record before the Hearing Officer. (A26, 27, 34)

While the district court determined that the Petitioner did produce enough evidence to support a finding that Dr. Aguayo was motivated by Petitioner's constitutionally protected conduct in causing the investigation of him that did not follow normal procedure, it concluded:

> The Plaintiff has failed to present evidence to support a finding that Aguayo's actions caused the plaintiff's discharge. The plaintiff's own evidence shows that he lost his job because the facts found by the Hearing Officer after a fair hearing established statutory grounds for his

> dismissal and that the Board's decision was a valid exercise of discretion. (A35)

He also determined that there was insufficient evidence to support the Section 1985(2) conspiracy claim. (A34)

In affirming the summary judgment, the United States Court of Appeals for the Tenth Circuit held:

> The hearing officer concluded, however, that Romero's conduct, including physical abuse, blackmail, and humiliation of students, justified his termination. (A6)
>
> * * *
>
> Based on a review of the record, we conclude the district court properly found Romero presented no evidence indicating his exercise of protected rights played a motivating part in the Board of Education's decision to terminate him. Romero was discharged according to the statutory procedure based on the officer's recommendations. Romero admits there is evidentiary support for the officer's factual findings concerning Romero's misconduct. The district court properly concluded his findings "break the chain of causation between any retaliatory motive by the individual defendants and their investigative and prosecutive roles and the discharge decision."
>
> Romero was unable to demonstrate the board of education's decision to terminate him was influenced by anyone or anything except the officer's report. He presented no material evidence supporting his allegations concerning improprieties in the Board's handling of this case. Romero was terminated because of his repeated misconduct while employed by the School District. The

defendants' retaliatory motivations, if they did exist, were not a motivating factor in this decision. Romero also failed to present any evidence supporting his conspiracy claim under Section 1985(2). (A10-12)

SUMMARY OF ARGUMENT

The Supreme Court fully analyzed the issue of causation and the appropriate causation test to apply in mixed motive cases in *Mt. Healthy School District v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977). The Petitioner stipulated in the trial court that the Board of Education relied solely on the Hearing Officer's findings and recommendation when it voted to dismiss the Petitioner. The District Court and Court of Appeals correctly applied the *Mt. Healthy* causation analysis in concluding the Hearing Officer's findings broke the chain of causation between the Board's act of terminating Petitioner and any improper motive by any individual defendant. The Tenth Circuit decision follows established precedent and does not conflict with any other case.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. This Court's *Mt. Healthy* causation analysis was correctly applied by the courts below since the Board of Education was motivated solely by the Hearing Officer's findings of fact and recommendation for dismissal.

The trial court concluded that although the evidence suggested that procedures followed in the investigation were not the regular procedure, that was not the "cause" of Petitioner's termination. The Court of Appeals held that, "Romero was terminated because of his repeated misconduct while employed by the School District. The defendants' retaliatory motives, if they did exist, were not a motivating factor in this decision." (A12) The Hearing Officer's findings of fact and recommendation to the Board that Petitioner be dismissed were the motivating factor in the dismissal. Since the parties stipulated that the Hearing Officer's findings and recommendation were the "sole" factor upon which the Board of Education relied, any improper motives by Dr. Aguayo had no causal connection to the dismissal.

The principles governing a public employee's First Amendment retaliation claim are well-established. Upon a showing that the speech in question is constitutionally protected, the employee must prove that the speech was a substantial or motivating factor in the challenged employment decision. *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568 (1977). *See also, Wulf v. City of Wichita*, 883 F.2d 842, 856 (10th Cir. 1989). The burden then shifts to the defendant to show by

a preponderance of the evidence that it would have reached the same decision absent the protected activity. Here, there is no dispute that the motivating factor in Petitioner's dismissal was **not** his claimed constitutionally protected activity but was, instead, the Hearing Officer's findings and recommendation.

The trial court concluded that the Hearing Officer's recommendation severed any causal link between the termination and any alleged improper motives of an individual Defendant. Petitioner based his entire appeal of the § 1983 claim on this finding. The causation inquiry in a § 1983 case looks to the reason for a challenged action and not the chain of events which led up to it. Petitioner does not even come close to showing that there is any direct conflict between the decision in this case and United States Supreme Court precedent and decisions of other circuits. There is nothing unique or new about the causation analysis of either the District Court or the Court of Appeals. The controlling Supreme Court case on mixed motive termination deals specifically with the causation inquiry and the "chain of events" theory.

> In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused. We think those are instructive in formulating the test to be applied here.

Mt. Healthy School Dist. v. Doyle, 429 U.S. at 286, 97 S.Ct. at 575.

Chief Justice (then Justice) Rehnquist then went on to cite *Lyons v. Oklahoma*, 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944); *Nardone v. United States*, 308 U.S. 338, 341, 60

S.Ct. 266, 84 L.Ed. 307 (1939); *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441 (1963); and *Parker v. North Carolina*, 397 U.S. 790, 796, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970). He noted that *Parker* and *Wong Sun* relied on the oft-quoted language from *Nardone*, "The connection between the arrest and the statement (given several days later) had 'become so attenuated as to dissipate the taint,' *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)." 371 U.S. at 491. This Court then concluded:

> While the type of causation on which the taint cases turn may differ somewhat from that which we apply here, those cases do suggest that the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.

429 U.S. at 287, 97 S.Ct. at 576.

Petitioner's contention that the individual defendants "caused" his termination mistakenly focuses upon the "chain of events" analysis. He argues that the wrongful motives of the individual Defendants resulted in an investigation which resulted in charges being filed, which, in turn, caused a hearing to be held, which led to findings by a neutral hearing officer, which led to a decision by the board of education to terminate based solely on those findings. By following this chain reaction of events, Petitioner ultimately concludes that he never would have been fired (even though he does not dispute that he deserved to be) but for the alleged wrongful motives of an individual Defendant. Petitioner is basing

his analysis on a classical negligence "chain of events" analysis.

That, however, is not the proper analysis. Rather, the Court must determine whether Petitioner met his initial burden that some protected activity was a *motivating factor* in the decision to terminate. *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. at 576. There is no dispute as to what motivated the decision by the Board of Education in this case. The parties stipulated that the "moving force," indeed, the **sole** force causing the termination, was the findings of the Hearing Officer that grounds for dismissal existed and his recommendation of termination. Discovery in this case produced no evidence of any other motivation by the Board of Education members. That should end the discussion. The Hearing Officer's findings of evidentiary fact are binding on the Board. *Blaine*, 748 P.2d at 1288.

It is noteworthy that throughout Petitioner's argument in this case, in the District Court, Court of Appeals, and now in this Court, he completely and totally ignores his own conduct against his own students which was the cause of his dismissal. The charges that were made by the students and parents to Dr. Aguayo in January, 1986, **required** an investigation by the appropriate school administrator and the subsequent findings at the adversarial hearing by a neutral hearing officer substantiated the requirement that those charges be investigated. The findings by Hearing Officer Snider involved "instances of physical abuse of students, violation of interscholastic wrestling rules, disruption to the school community, blackmail of students, promoting negative rather than positive social conduct and other causes of discipline."

(A118) He concluded, "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

Petitioner quotes a provision from *Malley v. Briggs*, 435 U.S. 335, 374, n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), that § 1983 "should be read against the background of tort liability and it makes a man responsible for the natural consequences of his action." In the context of this case, the application of that standard is in no way helpful to Petitioner. Even if Dr. Aguayo was improperly motivated in the investigation "which did not follow the normal procedural sequence," it must then be determined what are the "natural consequences of his action." The findings of the Hearing Officer were not based on procedures in the investigation or on the investigation itself; they were based on the first-hand testimony under oath of students, parents, and fellow teachers, all of whom were subject to the most aggressive cross examination. Such a hearing dissipated any possible taint in the procedural sequence followed in the investigation. Even if Petitioner could have demonstrated improper motive, the trial court was absolutely correct that the findings of the hearing officer " . . . break the chain of causation between any retaliatory motivation by individual defendants and their investigative and prosecutive roles in the discharge decision." (A27)

In the face of these findings by the Hearing Officer, it would be impossible for a board of education to fulfill its responsibility and do anything other than terminate the teacher. Petitioner cannot overcome those findings and those findings are good and sufficient grounds for the Board's action.

The procedures of the Tenure Act effectively prevent any possibility of the type of unfairness or bias Petitioner argues happened in this case. As noted elsewhere, the Board itself serves as a check on any improper motives by administrators by initially deciding whether the case should even go forward. C.R.S. § 22-63-117(2). The administrative hearing procedure, subject to rules of civil procedure, affords the most significant check on administrative abuse. The board's ultimate decision is significantly limited by the findings of fact made by the administrative hearing officer. *Blaine, supra.* Finally, the state appellate courts have further powers of review. C.R.S. § 22-63-117(11). Given these multiple checks and levels of review, it is virtually impossible for a teacher to lose his or her job as a result of improper and abusive motives on the part of administrators.[5] Certainly, the Tenure Act procedures achieved their purpose of guaranteeing fairness in this case. The fact that Petitioner challenges neither the fairness of the process nor the facts found by the Hearing Officer in the tenure case is fatal to his claims asserted here.

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[5] Petitioner's claim that the Board of Education of the Denver Public Schools "routinely discharged teachers whose discharge was sought by the administration" had no support in the record. Indeed, the only "evidence" that Petitioner presents for that proposition is a newspaper article, published three years after the termination of Romero, when the President of the Board of Education was commenting on another teacher tenure case. Respondent needs more than a newspaper article to establish "district policy." He needed facts to support the contention, and the record is devoid of such facts. Indeed, even

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The District Court and Tenth Circuit determined that Petitioner did not meet the threshold standard of *Mt. Healthy*; he did not produce evidence to show that the

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after extensive additional discovery which was allowed following oral argument on summary judgment, the district court concluded: " . . . the deposition testimony of four Board members was that each of them made a decision based solely on the record before the Hearing Officer." (A34) That finding, which Petitioner did not challenge in the Court of Appeals, dispelled the argument that the Board was merely "a rubber stamp."

This alleged policy of automatic termination, once an administrator recommended termination, would clearly violate the Colorado Supreme Court's interpretation of the Tenure Act that a board can only terminate a teacher if the findings of fact of the hearing officer support the statutory grounds for termination. *Blaine v. Moffat County School District RE No. 1*, 748 P.2d at 1288. If such an illegal policy existed, then how does Petitioner explain his failure to appeal this termination through the regular channels of the Tenure Act to the Colorado appellate courts?

City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 at 924, 99 L.Ed.2d 107 (1988), held that to establish § 1983 liability against a municipality "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the City's business." (cites omitted) 108 S.Ct. at 924. *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed2d 452 (1986), held that whether an official had final policy making authority is a question of state law. 475 U.S. at 483, 106 S.Ct. at 1300. In Colorado, a president of a board of education has no such authority; only a board of education can exercise final policy making authority. C.R.S. § 22-32-109, *et seq.* In this case, plaintiff failed to demonstrate any policy in violation of state law existed.

Board of Education was motivated by any constitutionally protected activity of Petitioner. The well-settled causation test enunciated in *Mt. Healthy* was correctly applied by the District Court and Court of Appeals, and there is simply no basis for granting a writ of certiorari in this case.

B. The courts below correctly determined that Petitioner presented no material facts to show that retaliation for the alleged exercise of free speech was a motivating factor in his termination.

In an effort to overcome the clear lack of evidence of any improper motivating factor attributable to the Board of Education, Petitioner makes some significant unsupported statements. His statement on page 13 that, "Romero proved in state court that he was removed as head wrestling coach and transferred twice because of his participation in a peaceful, nondisruptive protest by his wrestling team over racial indignities suffered the previous school year at another school," has no support in the record, was not an argument presented in the Court of Appeals and, is simply untrue. The only hearing that ever occurred in state court on that issue in a prior case was his request for a preliminary injunction. In dealing with those allegations, Judge Matsch specifically noted that Romero "sought a preliminary injunction which was refused." (A17) Judge Matsch had previously ruled that none of the defendants could be liable for retaliation for the claimed exercise of constitutional rights in connection with the temporary removal as a wrestling coach on the

transfers because Petitioner was barred as to those incidents based on a settlement agreement. (Amended Stipulated Pretrial Order, A137) Petitioner did not challenge that ruling on the appeal in the Tenth Circuit. Petitioner alleged a great deal, but proved nothing.

More importantly, in the discovery in connection with this case, the Petitioner admitted that he had no knowledge of any connection that any of the defendants, including Dr. Aguayo, had in his transfers and that he simply "imagined" that Dr. Aguayo had some knowledge of his prior suspension as wrestling coach. In the same vein, Petitioner claims that his attendance at the Scheele trial was "openly challenged by Aguayo." (p. 15) The record is devoid of any such challenge; the District Court correctly noted "Aguayo saw Romero there (at the trial)." (A18)[6]

It should be noted that the only possible improper motivation that was found by the Hearing Officer or the district court in connection with Dr. Aguayo related simply and solely to the procedural sequence in the *investigation*. It is incorrect for Petitioner to state that the administrator who instigated the proceedings against him was Dr. Aguayo. Under the Colorado statutes, only the Superintendent could file charges with the Board of Education, C.R.S. § 22-63-117(2), and that is exactly what happened in this case. Under those same statutes, only a Board of Education could accept those charges for review,

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[6] The District Court noted that, "Since Romero was not a witness in the *Scheele* trial, coverage of that claim by section 1985(2) is questionable." (A34)

C.R.S. § 22-63-117(2),(3) triggering the hearing before a neutral third party hearing officer.

Petitioner's claim of improper motivation stops at the investigation stage, simply because the sworn testimony of his own students, their parents, and his fellow teachers at the hearing held under the Tenure Act was so condemning and conclusive. He simply ignores and fails to note on pages 14 and 15 of his Petition that both the Hearing Officer, the District Court, and Court of Appeals concluded that regardless of any alleged improper motivation by the administrator in the conduct of the investigation, it was Romero's own improper and illegal actions against his own students that were the basis for his termination, and not any possible improper motivation in deviating from the normal procedural sequence in the investigation. (A119, 35, 12)

C. There is no conflict with other Tenth Circuit cases.

Two Tenth Circuit cases on which Petitioner relies for the proposition that summary judgment was improper are clearly distinguishable from the case at Bar. In neither case was there an intervening adversary hearing before a neutral hearing officer with findings of extensive wrongdoing. In *Ware v. Unified School District No. 492*, 902 F.2d 815 (10th Cir. 1990), the board of education terminated the school superintendent's secretary, who also acted as clerk of the board. The district provided no hearing prior to her dismissal. The majority noted that since there was no *respondeat superior* liability, it would require a direct causal link between Ware's exercise of First Amendment rights and her dismissal so that Board liability would lie

only for "deliberate indifference" to plaintiff's rights. The board members testified that they believed that Ware's speaking on a bond issue was a cause in her termination so the majority held the First Amendment issue should have been sent to the jury for resolution. These facts are far different from those in this case. Here, the Petitioner was given a full-scale adversary hearing before a neutral hearing officer. There was voluminous evidence of misconduct and the hearing officer made specific findings of fact of such misconduct. Under Colorado law, those findings of misconduct by the hearing officer are binding on the board of education, and the petitioner stipulated that the board was motivated solely by those findings of misconduct.[7] There was **no evidence** the board acted upon alleged exercise of First Amendment rights of the Petitioner.

Saye v. St. Vrain Valley School District RE-1J, 785 F.2d 862 (10th Cir. 1986) involved a nonrenewal of contract and not a dismissal action. Saye was a probationary teacher who could be non-renewed without a hearing. C.R.S. § 22-63-110. Saye alleged that he was terminated for union organizing which was protected by the First Amendment, and school board members testified that in

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[7] Petitioner incorrectly notes that Hearing Officer Snider urged the School District to place Romero on a one-year probation. (Petition, p. 23, footnote 2) The Hearing Officer simply noted that probation was an option that the Board may wish to consider since he did not have such an option under the law. (A120) However, his categorical determination was, "It is difficult to consider this catalogue of misconduct and recommend any action other than dismissal." (A118)

voting not to renew Saye's contract, they relied completely on the recommendation of the superintendent who was familiar with Saye's union activity. There was no intervening hearing by a neutral hearing officer in the *Saye* case; there were no findings of fact by a hearing officer that were binding on the board of education.

The decision of the Court of Appeals does not conflict with any Tenth Circuit decisions.

D. The Tenth Circuit decision does not conflict with Supreme Court precedent or decisions of other circuits.

Petitioner simply ignores the "taint" case analysis of *Mt. Healthy*, 429 U.S. at 287, and cites a number of other cases in an attempt to bolster his notion of tort-style cause. However, an examination of those cases, which were also cited to the Tenth Circuit, reveals that they are simply not applicable or plainly distinguishable.

Petitioner emphasizes the Supreme Court decision in *Malley v. Briggs*, 435 U.S. 325, 106 S.Ct. 1092, 89 L.Ed. 271 (1986). *Malley* involved a case of police immunity under § 1983. Plaintiffs alleged unconstitutional arrest by defendant's presenting a judge with an affidavit and complaint which did not establish probable cause. The causal chain argument was not even raised, but was discussed at footnote 7, 106 S.Ct. at 1098 of the Court's opinion. It said it did not find any break in the causal chain because the common law recognized a causal link between submission of a complaint and an ensuing arrest. The court did not decide whether the police department's actions were

objectively reasonable, but sent the issue back for reconsideration. It should be emphasized that the grand jury did not return an indictment, therefore, the charge was dropped.[8]

The situation in *Malley* cannot be analogized to this case. Petitioner's complaint is that he was wrongfully terminated. Unlike the situation in *Malley*, the Petitioner here was not exonerated; the charges against Petitioner proved true. Petitioner was not terminated because of the procedures followed in the investigation. The neutral hearing officer found that Petitioner was guilty of misconduct, justifying his dismissal, and the Petitioner does not even challenge that finding and conceded the hearing was fairly conducted. Petitioner's reliance on *Malley* is misplaced.

Petitioner's citation of *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 97 S.Ct. 55, 50 L.Ed.2d 450 (1977) is curious and confusing. That case involved alleged violations of the Fair Housing Act and the Fourteenth Amendment. The issue was race discrimination, and the statement cited in Petitioner's petition referred to proof of discriminatory intent. Plaintiffs in that case failed to show a series of official actions taken for invidious purposes. While it is questionable whether this

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[8] The Supreme Court has held that an indictment by a properly constituted grand jury exclusively determines the existence of probable cause. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 945 S.Ct. 1895, 40 L.Ed.2d 406 (1974). Probable cause exists even if the indictment is based on unreliable, incompetent or even perjured testimony. *U.S. v. Calandra*, 414 U.S. 338, 344-45, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

line of reasoning applies to this case, the record does not show a series of official actions taken for invidious purposes against Romero. To the contrary, the record shows the District acted properly in dismissing him, and that the appeal of his dismissal would have been affirmed by the Colorado Court of Appeals.

Professional Association of College Educators v. El Paso City Community College, 730 F.2d 258 (5th Cir. 1984), *cert denied*, 469 U.S. 881, 105 S.Ct. 248, 83 L.Ed.2d 186 (1984) was another case involving termination without a hearing, in this case for union organizing. It is interesting to note that footnote 13, discussing potential reinstatement, said plaintiffs would not be entitled to reinstatement if subsequent facts found misconduct not justifying reinstatement. In this case, the acts of misconduct were detailed during an adversary hearing, and justified Petitioner's termination. The case is clearly not applicable.

Flores v. Pierce, 617 F.2d 1386 (9th Cir. 1980) was a liquor licensing case. The plaintiff's original application was initially denied, then cleared through the division of Alcoholic Beverage Control. The evidence showed that the commission would initially deny any application if there was a colorable complaint from public officials. The Ninth Circuit disagreed with the city officials' attempt to shift the blame to the Division, stating that the violation was not the initial denial, but city officials' policy of forcing applicants to take extraordinary measures for issuance of a license. Petitioner's argument appears to be that when a school administrator decides an employee should be terminated that termination is inevitable. While for purposes of this case it may be argued that filing of charges was inevitable, it was not inevitable that

the ALJ would make extensive findings of gross misconduct and/or recommend termination. Judge Snider's statement about the inevitability of dismissal related to filing of charges, not the ultimate result. The dismissal was based solely on the finding of Judge Snider.

Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989) and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), cited in *Goodwin*, involved deliberate supplying of misleading information by police officers leading to arrest. Neither of these cases discussed the Supreme Court cases on probable cause, *supra*. However, Petitioner has not presented evidence that had it not been for alleged improper actions by Aguayo, he would not have been charged or dismissed. By his own admission, there were complaints lodged against him by parents and students, which initiated the investigation. Even Petitioner does not claim, and he presented no evidence to show anyone, including Dr. Aguayo, provided misleading information.

Rodriguez v. Comas, 888 F.2d 899 (1st Cir. 1989), is also a case where the § 1983 plaintiff had been subjected to the hazards of defending himself in a criminal procedure, but was acquitted, as a result of the wrongfully motivated actions of the defendant. For the reasons already noted, that fact distinguishes the subject case.

The trial court correctly concluded that there was no causal link between any improper motive by an individual Defendant and the Board's dismissal of Petitioner. The procedural sequence of the initial investigation is the only possible "taint" found here. (A35) There is no contention that the individual Defendants improperly influenced or tainted the statutory Tenure Act proceedings.

Those proceedings provided Petitioner with a full and fair opportunity to defend himself. The "moving force" behind Petitioner's dismissal was the findings and recommendation of the Hearing Officer in the Tenure Act case, not the allegedly improper motive of an individual Defendant. (A35, A12)

CONCLUSION

Review is not warranted by any of the considerations in Rule 10 of the Supreme Court rules. Moreover, the outcome of this case depended in a large part on the requirements of state statutory law and the overwhelming factual evidence that justified Petitioner's dismissal. Court review of this case will generate a decision of little precedential value for cases in Colorado, or in states with statutory mechanisms for deciding public employee dismissals. Finally, the lack of cases factually similar to this demonstrates the unusual nature of this Petition, and does not justify use of this Court's scarce resources.

This case does not involve any novel issue; the causation test for a mixed motive case was definitively resolved in *Mt. Healthy*, and it was correctly applied in this case. The decisions are not in conflict with any

Supreme Court precedent or applicable decisions of other circuits. The Petition for Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-M-6

EDWARD J. ROMERO,

Plaintiff,

vs.

ALBERT AGUAYO, et al,

Defendants.

AMENDED STIPULATED PRE-TRIAL ORDER

I. DATE AND APPEARANCE

The Plaintiff is represented Larry F. Hobbs. The Defendants are represented by Semple & Jackson, P.C. by Martin Semple and Dwight L. Pringle.

II. JURISDICTION

The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff is alleging claims arising under the First and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. §§ 1983 and 1985.

III. CLAIMS AND DEFENSES

A. Plaintiff's Claims

Plaintiff was at all times material times a regularly certified public school teacher employed by the defendant school district under tenure until he was dismissed on June 19, 1986. In addition to the defendant school district the individual defendants are, at times material, Scamman, Superintendent, Aguayo, Assistant Superintendent, and Moser, Principal at Manual High School. At the time of his discharge plaintiff was assigned as a classroom teacher of industrial arts of Manual High School. He was also Manual High School's head wrestling coach. Prior to his assignment at Manual High School he had been assigned at Henry Junior High School.

Plaintiff states two (2) claims, the first against all defendants pursuant to 42 U.S.C. § 1983. Here, plaintiff claims that all defendants caused his discharge for constitutionally protected conduct including plaintiff's persistent advocacy of the rights of minority students in the defendant school district, and because of his participation and support of a colleague coach, Glenn Scheele, in Scheele's litigation against the defendant Aguayo and the defendant school district in this court in Civil Action No. 83-K-321.

In his claim pursuant to 42 U.S.C. § 1983, plaintiff seeks compensatory damages against all defendants and exemplary damages against the defendants Scamman, Aguayo, and Moser, claiming that these defendants, or each of them, acted with malice or willful disregard for his rights.

In his claim pursuant to 42 U.S.C. § 1985(2), plaintiff claims that the individual defendants, Scamman, Aguayo, and Moser, conspired in seeking and procuring plaintiff's discharge to injure the plaintiff in his person and property on account of his attendance in this court on behalf of Scheele in Civil Action No. 83-K-321.

In his claim pursuant to 42 U.S.C. § 1985(2), plaintiff seeks compensatory and exemplary damages against the individual defendants claiming the individual defendants acted with malice or in willful disregard of plaintiff's rights.

Plaintiff also seeks reinstatement to his teaching position and award of attorney's fees pursuant to 42 U.S.C. § 1988.

B. Defendants' Claims and Defenses

Defendants deny all allegations of liability.

While defendants admit that plaintiff's employment as a tenure teacher with the defendant district was terminated on the date alleged, defendants deny that the reasons for the termination were plaintiff's allegedly constitutionally-protected activities. Rather, defendants contend that the reasons for plaintiff's dismissal were those set forth in the Board's Order of Dismissal which are based on the findings of fact and recommendations of Administrative Law Judge Marshall Snider in the proceedings brought against plaintiff on February 20, 1986 pursuant to the Colorado Teacher Employment, Tenure and Dismissal Act, C.R.S. 22-63-101, *et seq.* (Tenure Act) Those findings concluded that the District had proven

several of the statutory grounds for dismissal under the Tenure Act and recommended to the Defendant Board of Education that plaintiff be dismissed.

Defendants also deny the existence of any conspiracy since all defendants are part of the same entity and therefore, could not, as a matter of law, conspire among themselves.

Defendants contend that plaintiff is prohibited from recovering damages for any events predating the settlement in Civil Action No. 82 CV 5767 captioned *Romero vs. School District No. 1.* Although the court has indicated that plaintiff may present evidence of events predating the settlement agreement as historical background, defendants maintain plaintiff is precluded from recovering damages with respect thereto and defendants are entitled to an instruction to that effect.

By way of defenses, defendants contend that plaintiff failed to timely exhaust his remedies under the Tenure Act, which provided judicial review in the state courts. Defendants have successfully contended that the facts litigated and determined in the Tenure Act case shall not be subject to relitigation in this case. Defendants further contend that plaintiff has failed to mitigate his damages, if any.

Individual defendants contend that they are protected from liability in this case by the doctrines of qualified and/or absolute immunity, insofar as their actions as alleged in the complaint were undertaken in good faith and within the scope of their official duties.

IV. STIPULATIONS

A. Plaintiff was at all times material a regularly certified teacher employed by the defendant school district until June 19, 1986.

B. The individual defendants, Scamman, Aguayo, and Moser, were employed as administrators with the defendant school district, and at all relevant times were acting as employees of the School District under color of state law.

C. School District No. 1, City and County of Denver, as a defendant, is a person as that term is used in 42 U.S.C. § 1983, and its actions herein have been actions under color of state law.

D. On June 19, 1986, plaintiff was discharged for cause by the Board of Education of the Defendant School District.

E. Plaintiff could only be discharged for statutorily specified cause.

F. Plaintiff was subpoenaed by Scheele as a witness, but plaintiff did not testify at trial in *Scheele v. Aguayo* nor was he deposed in that case.

G. Plaintiff was afforded a hearing as provided by the Teacher Tenure Act, at which he was represented by counsel. Pursuant to C.R.S. § 22-63-117, Hearing Officer Snider made findings that certain of the statutory charges for dismissal had been proved and recommended plaintiff's termination.

H. Relying solely on Mr. Snider's finding and recommendation, the Board of Education voted to dismiss plaintiff.

I. Plaintiff did not seek review of the Board's action of dismissal in the Colorado Court of Appeals as provided by C.R.S. § 22-63-117.

* * *

DATED this 20th day of July, 1988.

BY THE COURT:

s/Richard P. Matsch
Richard Matsch
United States
District Judge

APPROVED AS TO FORM:

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Case Number: 87-M-6

I certify that I mailed a copy of the attached to the following:

Dated: July 20, 1988 JAMES R. MANSPEAKER, CLERK

BY: Glenna Bloxson
Jacob Gilmore,
Deputy Clerk
Glenna Bloxson,
Secretary

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